No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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INTRODUCTION

For 93 years, the Peace Cross has stood in solemn commemoration of the 49 residents of Prince George's County who gave their lives "in the Great War for the liberty of the world." JA 932. Its symbol, the Latin cross, is one "often used to honor and respect" the Nation's fallen soldiers. *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). Its inscriptions, setting, and usage are exclusively secular. And for centuries, similar crosses have been displayed throughout the country to commemorate

sacrifice and military valor. Under this Court's well-settled precedents, the Establishment Clause does not demand that this longstanding monument be dismembered or destroyed.

Despite the length and tenor of their brief, respondents come up all but empty-handed in their effort to show otherwise. Respondents start by claiming that the Latin cross has an "exclusively Christian meaning." Resp. Br. 16. But they ultimately concede that "context matters" in determining what message the Latin cross conveys, *id.* at 96, and that many war memorials that bear the shape of a cross—including two similar World War I memorials in Arlington National Cemetery—may in fact communicate a secular message of commemoration. *Id.* at 93-98.

As to the Peace Cross itself, respondents do not contest that the Latin cross was a ubiquitous symbol of the World War I dead, that the content and setting of the memorial are secular, and that the Peace Cross has consistently been used as a site for civic commemorative events. Instead, respondents' case against the Peace Cross boils down to essentially two claims: that the memorial is "prominent," and that the origins of the Peace Cross were drenched in sectarianism and racism. The size of the cross, however, says nothing about the *content* of its message. And virtually every one of respondents' outrageous and largely irrelevant smears against the memorial's founders is demonstrably false.

Nor do respondents dispute that there is a centuries-old tradition of erecting cross monuments. They argue merely that this tradition may be ignored. But the Court held otherwise in *Town of Greece* v. *Gallo-*

way, 572 U.S. 565 (2014), and respondents offer no reason to revisit that recent and well-supported precedent.

In the end, respondents produce little but rhetoric to support the decision below. That is no surprise. This Court upheld a monument markedly analogous to the Peace Cross in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). And requiring the removal or disfigurement of this nearly century-old memorial to the war dead, and hundreds more like it, would sow the very divisiveness the Establishment Clause is designed to prevent. The judgment should be reversed.

ARGUMENT

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Establishment Clause Does Not Categorically Prohibit Displaying A Cross As A Symbol Of Sacrifice And Loss.

This Court has long made clear that governments may display religious symbols without violating the constitutional commitment to religious neutrality. In some cases, the Court has held that *context* renders such displays constitutional, by demonstrating that the purpose and objective meaning of the display are predominantly secular. Comm'n Br. 26-31. In other instances, the Court has looked to *history*, finding that a long tradition of such displays shows that they can coexist with principles of disestablishment. *Id.* at 31-33. The Latin cross is no exception: As the plurality explained in *Buono*, "a Latin cross is not merely a reaffirmation of Christian beliefs," but "a symbol often used to honor and respect" the Nation's war dead. 559 U.S. at 721.

Respondents devote the first section of their brief to rejecting these precedents wholesale. They contend that by displaying a symbol associated with a particular religion, the government necessarily endorses "sectarian religious belief." Resp. Br. 30-33 (citation omitted). And they argue that the Latin cross is so "obvious[ly]" and "potent[ly]" sectarian that it inevitably endorses the "doctrine of atonement through Christ's crucifixion." *Id.* at 34-53 (citations omitted). Those arguments are both fundamentally misguided and irreconcilable with this Court's longstanding precedents—and even respondents ultimately abandon them.

To start, respondents err by equating the display of a religious symbol with the endorsement of a particular religion. As respondents acknowledge, religious symbols often have "dual meaning[s]," *see* Resp. Br. 53, 91, and governments can and do display them to invoke their secular rather than religious connotations. For instance, in *Lynch* and *Allegheny*, the Court upheld the display of a crèche and a menorah, respectively, because in context they served as ways of "depict[ing] the origins" of a "National Holiday," *Lynch* v. *Donnelly*, 465 U.S. 668, 680-681 (1984), or of celebrating the values of "pluralism and freedom to choose one's own beliefs," *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 634 (1989) (O'Connor, J., concurring in part and concurring in judgment); *see also Town of Greece*, 572 U.S. at 582-583 (rejecting "the suggestion that legislative prayer must be nonsectarian" to serve the "legitimate function" of solemnizing legislative sessions).

Respondents read these cases to stand for the proposition that displays of "sectarian symbols" are

permissible only if they are "seasonal," "remote," or "privately sponsored." Resp. Br. 30-33. But no case has imposed such "fixed, *per se* rule[s]" on the use of religious symbols. *Lynch*, 465 U.S. at 678. To the contrary, the Court has repeatedly emphasized that precisely the opposite characteristics—longevity, the presence of nearby secular displays, and association with civic values—can be powerful indications that a monument's meaning is secular. *See Van Orden*, 545 U.S. at 701-703 (Breyer, J., concurring in judgment); *Buono*, 559 U.S. at 715-716 (plurality opinion); *see also Pleasant Grove City* v. *Summum*, 555 U.S. 460, 473-478 (2009).[1]

Respondents are also incorrect in suggesting that the Latin cross is so inherently sectarian that a display of that symbol necessarily endorses Christian belief. Resp. Br. 34. No one denies, of course, that the cross is a "preeminent symbol of Christianity." *Buono*, 559 U.S. at 725 (Alito, J., concurring in part and concurring in judgment). But like other reli-

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[1] Respondents distort Justice Scalia's statements to suggest that he endorsed a categorical prohibition on sectarian symbols. *See* Resp. Br. 31. In *McCreary County* v. *ACLU*, Justice Scalia *rejected* the suggestion that displaying a version of the Ten Commandments ascribed to by only some faiths amounts to "taking sides in a doctrinal controversy" or endorsing "a particular version of the Decalogue as authoritative." 545 U.S. 844, 894 n.4, 909 n.12 (2005) (Scalia, J., dissenting). And in *Capitol Square Review & Advisory Board* v. *Pinette*, Justice Scalia *distinguished* between "the government's use of religious symbols" and the "endorse[ment] [of] sectarian religious belief," explaining that *Lynch* upheld "a city's display of a crèche"—an indisputably Christian symbol—"because, in context, the display did not endorse religion." 515 U.S. 753, 764-765 (1995) (plurality opinion).

gious symbols, a cross is capable of conveying "different messages." *Id.* (citing *Summum*, 555 U.S. at 474); *see id.* at 747 n.7 (Stevens, J., dissenting) (in certain contexts, "th[e] cross * * * may be understood to convey a primarily nonreligious message"). *Buono* thus found that the display of an unadorned Latin cross to commemorate the World War I dead did not "promote a Christian message" or "set the *imprimatur* of the state on a particular creed," but served "simply to honor our Nation's fallen soldiers." *Id.* at 715 (plurality opinion).

Respondents dismiss that statement as "dicta." Resp. Br. 42-43. Not so. The plurality's understanding of the cross's meaning was integral to its holding that the district court "took insufficient account of * * * context" when it found that Congress had an "illicit" motive in acting to preserve the Sunrise Cross. *Buono*, 559 U.S. at 715.

Nor has the Court elsewhere characterized the cross as an exclusively religious symbol. *Cf.* Resp. Br. 32-35. In *Pinette*, the Court assumed that a cross erected by the Ku Klux Klan on government property was "private religious speech"; it did not decide whether that display actually conveyed a primarily religious message, let alone whether other, entirely dissimilar cross monuments would do so. 515 U.S. at 760; *see id.* at 771 (Thomas, J., concurring) (concluding that the Klan cross was "primarily nonreligious"). In *Allegheny*, Justice Blackmun and Justice Kennedy agreed that the government may not display crosses that carry an obvious endorsement of Christianity, such as a cross erected by "the Holy Name Society * * * on the Grand Staircase at Easter," 492 U.S. at 599 (opinion of Blackmun, J.), or "a

large Latin cross on the roof of city hall," *id.* at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). The Court said nothing about crosses more generally; and in *Buono*, Justice Kennedy expressly distinguished those extreme examples from the World War I cross at issue, explaining that unlike the hypothetical "'cross on the roof of city hall,'" the memorial in *Buono* "was not emplaced on Sunrise Rock to promote a Christian message." 559 U.S. at 715 (plurality opinion) (quoting *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part)).[2]

Respondents also argue that any display of a cross to convey a secular message impermissibly "degrade[s] religion." Resp. Br. 49. That argument, however, would invalidate *every* government display of a religious symbol for a secular end, directly contrary to the Court's precedents. And it rests on a false premise: The government's use of a religious symbol for a secular purpose does not dictate how private individuals view the symbol, or prevent adherents from continuing to find religious meaning in it. *See Lynch*, 465 U.S. at 685 (observing that "[t]he crèche may well have special meaning to those whose faith includes the celebration of religious

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[2] Respondents assert that their amici who are "non-Christians" are "the arbiters" of what crosses mean. Resp. Br. 37. That is not correct. The Establishment Clause requires an objective inquiry into the purpose and meaning of a challenged display, not a straw poll of objectors. And members of minority religions have come down on both sides of this question. *See, e.g.*, Nat'l Jewish Comm'n on Law & Public Affairs Br.; Jewish Coalition for Religious Liberty Br.; Kamal S. Kalsi Br; Islam & Religious Freedom Action Team Br.

masses"); *Summum*, 555 U.S. at 475 (explaining that "monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers").

In the end, even respondents admit that the cross does not always and inevitably convey a message of sectarian favoritism. When faced with the untenable implications of that position—*i.e.*, that every government display employing a cross would need to be torn down—respondents abruptly backtrack. "[C]ontext matters," they admit, Resp. Br. 96, and thus numerous displays that employ the cross as a symbol of sacrifice may in fact be constitutional, *id.* at 93-98. That is a welcome concession, but it forfeits the central premise of respondents' brief: that the Latin cross is a "symbol of Christianity and Christianity alone." *Id.* at i.

Despite respondents' rhetoric, then, respondents and the Commission ultimately agree on the basic inquiry in this case. The cross sometimes conveys a message of secular commemoration and sometimes does not. And the Court should consult context and history to determine its meaning in a particular case.

B. The Peace Cross Is Constitutional.

1. *The purpose and objective meaning of the Peace Cross are secular.*

That well-settled inquiry resolves this case. Respondents do not dispute that, in determining the purpose and meaning of the Peace Cross, the Court should apply the considerations set forth in the controlling opinions in *Van Orden* and *Buono*. *See* Resp. Br. 53-54; *accord* U.S. Br. 25-30. Every one of those considerations powerfully affirms the Peace Cross's constitutionality.

a. As *Buono* held, the symbol used by the Peace Cross can convey not only a Christian message, but a secular message of "honor[ing] our Nation's fallen soldiers." 559 U.S. at 715, 721 (plurality opinion); *see* Comm'n Br. 4-9. Multiple amici confirm as much: As they extensively show, in the wake of World War I the Latin cross became a ubiquitous symbol of sacrifice and loss—in poetry and visual art, in military honors, in contemporaneous statements of the bereaved, and in numerous memorials to the fallen. *See, e.g.*, VFW Br. 10-26; Retired Generals & Flag Officers Br. 8-13; U.S. Senators & Representatives Br. 4-9.

Respondents and their amici make no attempt to engage with this mountain of historical evidence. Instead, they reason that because the cross was used as a grave marker for individual Christians, it follows that the cross honors only Christians when used as a universal symbol of sacrifice. Resp. Br. 42-47. That does not follow. As respondents' own expert has written, the cross assumed a meaning as "a cultural image of the battlefield" that transcended its use as an individual grave marker. JA 1127; *see* JA 937, 1143. By evoking the seas of crosses on the front, the builders of the Peace Cross and other such memorials recalled not only the individual men buried under battlefield crosses—many of whom were themselves not Christian[3]—but also what the

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[3] Crosses were used to mark the graves not only of Christians, but of individuals whose faith was unknown or who were neither Christian nor Jewish. JA 108-109, 945. Furthermore, at the time the Peace Cross was designed, many Jewish soldiers who had not yet been identified were buried under crosses. *See Jewish Welfare Board*, 59 Reform Advocate 556, 556 (1920),

"crosses row on row" came to represent: the unfathomable toll of the war, the cause for which the soldiers fought, and the far-off cemeteries where countless dead had been laid to rest. Comm'n Br. 4-7; *see* VFW Br. 9-17.

b. The face of the Peace Cross and the circumstances surrounding its placement confirm that the monument was erected to convey a secular message of sacrifice and loss. The Cross's dedication, inscriptions, and insignia are exclusively secular; the Cross was erected by bereaved mothers and a veterans organization for the stated purpose of honoring the war dead; and the government acquired the monument for preservation and traffic safety purposes, while permitting the American Legion to continue to

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available at http://tinyurl.com/yy8rsdwk; JA 1199-1202. And it is well-documented that some Jewish families from combatant nations assented to the use of a cross to bury their loved ones because they did not view it as a religious symbol. *See* Tim Grady, *The German-Jewish Soldiers of the First World War in History and Memory* 37-38 (2011) (explaining that "[m]any German Jews * * * consented to the use of Christian symbols in the burial of Jewish soldiers at the front" because "[i]nstead of symbolising Christianity, German Jews regarded these objects or markers as a sign of the German war experience"); *see also* George L. Mosse, *Masses and Man* 267 (1987) (stating that an American Jewish leader "protested" when "the Star of David was substituted" for "crosses on the graves of Jewish soldiers" because "Jews and Christians fought shoulder to shoulder, actuated by the same patriotic impulse"); Retired Generals & Flag Officers Br. 9 (concluding that some American Jewish families requested that their relatives be buried under a cross).

conduct civic commemorative events at the site. Comm'n Br 37-39.[4]

Respondents shut their eyes to virtually all of this evidence, going so far as to assert that the Peace Cross has "*no* secular features" apart from the Legion symbol. Resp. Br. 9. Respondents instead focus on such aesthetic minutiae as the fact that the cross is "light brown" rather than "white" and that sometimes the bushes surrounding it are overgrown. *Id.* at 9-10, 47. The Establishment Clause inquiry does not turn on such trivial details; and in any event, when the Peace Cross was designed and built, the cross markers overseas were made of wood, not white marble, and memorial crosses often varied in color. *See* JA 941-953, 1163-64.

Respondents also level a staggering, scorched-earth campaign against the monument's founders, impugning their motives and tarring them as anti-Semites and racists. Resp. Br. 1-8, 47-49. Space constrains our ability to respond at length to all of these distortions, which have only passing relevance to the constitutional inquiry. *See Van Orden*, 545 U.S. 701-702 (Breyer, J., concurring in judgment) (upholding monument where private founders had "primarily

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[4] Respondents accuse the Commission of "mislead[ing]" the Court by claiming that "the Commission owns the 'Cross only because of roadway expansion and traffic safety concerns.'" Resp. Br. 11 (purportedly quoting Comm'n Br. 13). The quoted language does not appear in the Commission's brief, which acknowledges on the very page respondents cite that the Commission acquired the Peace Cross in part "to preserve the monument." Comm'n Br. 13.

secular" motives). But virtually every scandalous claim in respondents' brief is untrue.

The monument's founders did not refer to the monument as the "Calvary Cross," use it as a site for prayer services, or borrow its design from a Catholic shrine. *See* Resp. Br. 1-4, 48-49. The four references to "calvary" that respondents identify were made, in passing, by newspaper reporters and an invited speaker, JA 216, 428, 431, 433; in every recorded instance in which the monument's founders referred to the Cross, they called it the "Memorial Cross" and referred to its organizing committee as the "Prince George's County Memorial Committee." *See, e.g.*, JA 172-175, 210-211, 1001, 1014, 1056-58, 1060-61, 1244. All of the "prayers" to which respondents refer were simply benedictions or invocations at veterans' events or dedication ceremonies. JA 217-218, 472, 474, 477, 1058-59, 1407-08. One event they discuss did not occur at the Peace Cross at all. JA 1061 (describing event at Zantzinger's Park in the neighboring town of Hyattsville). John Earley was a noted sculptor whose work ran the gamut from a Bahá'í temple to a replica of the Parthenon. *See* JA 1348-50. That one of his many prior works was a Catholic shrine does not transform his "mosaic and thin-panel methods" into acts of religious endorsement. Resp. Br. 48 (quoting JA 1350).

Nor is there merit to respondents' outrageous charges of racism and anti-Semitism. Ten of the men honored on the Peace Cross are African-Americans, JA 1559-69, and one of the local American Legion leaders principally responsible for its construction was J. Moses Edlavitch, a Jewish veteran who immigrated to the United States from Russia

when he was 14. *See* JA 65, 205, 990; *Funeral Being Held For Capt. Edlavitch*, Evening Sun, Feb. 21, 1936, at 10, *available at* http://tinyurl.com/y4a8bzqk. As the District Court found, the suggestion that there is some connection between the Peace Cross and the Ku Klux Klan is "simply wrong." Pet. App. 62a n.5. None of the Klan events respondents describe took place at the Cross, and most occurred miles away. *See* JA 118-119, 495-496, 505-506. There is also no evidence that the "carnival games" that respondents reference were used to support the memorial. Resp. Br. 7, 80; *see* C.A. JA 2075.[5]

Then there is respondents' breathtaking charge that a Gold Star mother, Mrs. Martin Redman, was making a "mercenary plea," Resp. Br. 48, when she thanked her senator for supporting the Peace Cross by explaining that "my son * * * lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone," JA 989. Redman's son, respondents sneer, "is not even named on the Cross." Resp. Br. 48. In fact, Redman was "the first Navy man lost to Prince George's County," and his bereaved mother was given the honor of dedicating the highway next to which the Cross stood. JA 175-176.

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[5] Amicus Military Religious Freedom Foundation speculates (at Br. 19-22) that the Peace Cross selectively excludes Jewish veterans. That charge is baseless. There is no record of the religion of many of the men named on the memorial, let alone evidence that a single Jewish veteran was excluded. Moreover, a nearby display that respondents concede is secular similarly lists 47 "Men from Prince George's County" who died in the war. JA 111-112; *see* Resp. Br. 1 (stating that "the same names" are listed on the two memorials).

c. The physical setting of the Peace Cross confirms its commemorative meaning. It is part of a collection of commemorative monuments known as Veterans Memorial Park, and holds a "strategic position" on the National Defense Highway dedicated to the servicemembers who died in the war. JA 1246; *see* Comm'n Br. 39-40. Respondents argue that the Peace Cross is not "integrated with other monuments." Resp. Br. 61. To the contrary, the Peace Cross and the surrounding memorials bear a consistent theme, and a nearby National Park Service trail marker entitled "Honoring their Service" describes each of the memorials and states that the area "has become a place for communities to commemorate their residents in service and in death." JA 1517-18. In addition, all of the surrounding monuments are located within approximately 300 feet of the Peace Cross, such that a person standing or driving nearby can easily see multiple monuments at once. JA 1528-29; *see* JA 887-904 (map and photographs of park).

Respondents repeatedly observe that the Peace Cross is "prominent"—indeed, they make this the centerpiece of their argument, repeating the point on the first page of their brief, the 97th, and numerous places in between. *See* Resp. Br. i, 1, 20, 21, 23, 25, 33, 37, 47, 54, 57, 58, 61, 63, 73, 87, 92, 97. But as respondents acknowledge, the monument's prominence just means that it "speaks more loudly," *id.* at 57; it does not alter what it says. If anything, the frequency with which individuals encounter the monument helps establish "a shared understanding of its legitimate nonreligious purpose." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring in judgment); *see Van*

Orden, 545 U.S. at 700 (Breyer, J., concurring in judgment) (upholding "large granite monument * * * on the grounds of the Texas State Capitol"). As local officials explain, that is exactly what happened here: the Peace Cross has become "a prominent shared civic space central to the communal life of Bladensburg and Prince George's County." Maryland Elected Officials & Prince George's County Br. 8-13.

d. Finally, respondents do not dispute that, for 93 years, the Peace Cross has served virtually exclusively as a site for secular commemorative events, that it has become a historic landmark, and that until this litigation there was no record of any person challenging it as a religious symbol. Comm'n Br. 41-44; *see* Maryland Elected Officials & Prince George's County Br. 5-18; Maryland Br. 3. Respondents' only response to this century of history is to repeat their claim that the Peace Cross has been the site of "prayers," Resp. Br. 12-13, 64; again, those were benedictions and invocations at commemorative events. *See, e.g.*, JA 187-188, 249, 1043. Respondents also darkly note that the Commission thanked an Air Force chaplain for delivering a benediction at the Veteran's Day service in 1985. Resp. Br. 12 (citing JA 195). Basic courtesy does not violate the Establishment Clause.

Respondents speculate that the Peace Cross went unchallenged for nearly 90 years because, throughout that period, the State of Maryland was gripped by a "climate of intimidation" toward religious minorities. Resp. Br. 65-66 (citation omitted).[6] That

[6] Respondents state that their counsel received threats in connection with a separate suit challenging a religious display

defies credulity. It has been half a century since plaintiffs challenged and succeeded in overturning the very Maryland laws that respondents claim contributed to an air of stifling censorship. *See Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *State* v. *West*, 263 A.2d 602, 603-604 (Md. Ct. Spec. App. 1970). The likely reason that no one challenged this monument until a few years ago is that "few individuals, whatever their system of beliefs, * * * understood the monument as amounting * * * to a government effort to favor a particular religious sect." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment).

2. *The Peace Cross fits within an undisputed tradition of displaying crosses as symbols of sacrifice and military valor.*

The Peace Cross is also constitutional for the independent reason that it fits within a centuries-old tradition of displaying the cross as a symbol of martial valor and sacrifice. Comm'n Br. 44-50. Cross monuments have been erected in the United States since the earliest settlers arrived in America, and hundreds of crosses now stand in honor of those who fought and died in the Civil War, the World Wars, and other local and national tragedies. *Id.* at 45-48. Amici have identified many additional examples of that tradition: a stone cross honoring a messenger who fell during the Battle of Chickamauga; World War I crosses in Baltimore, Brooklyn, and Philadelphia; and monuments from Coos Bay, Oregon, to

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in Pensacola, Florida. Resp. Br. 66. The Commission unequivocally denounces such threats, which have no place in this or any other litigation.

Lewisville, North Carolina, honoring the fallen of every war since the Revolution. *See, e.g.*, West Virginia & 29 Other States Br. 18-26; U.S. Senators & Representatives Br. 4-15; Various Professors Br. 15-19; Utah Highway Patrol Ass'n Br. 6-20.

Respondents and their amici scarcely attempt to dispute the existence or breadth of this tradition. Respondents quibble (at 74-75) that two of the examples are English crosses or Maltese crosses, rather than Latin or Celtic crosses. That objection makes little sense; these crosses all ultimately derive from the same religious symbol. And, in any event, those two examples are drops in the ocean of examples the Commission and its amici have identified.

Respondents instead rest on the claim that this longstanding history is simply irrelevant. Resp. Br. 67-71. But *Town of Greece* expressly held that "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings,'" and that "it is not necessary to define the precise boundary of the Establishment Clause *where history shows that the specific practice is permitted*." 572 U.S. at 576-577 (emphases added) (citation omitted). Nothing in the language or logic of the opinion was limited to legislative prayer and other "internal practice[s]." Resp. Br. 70-73. And prior cases have relied on history and tradition to uphold a variety of other practices and displays. *See* Comm'n Br. 31-33.

Respondents' cases only confirm as much. In *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664 (1970), the Court explained that while "no one acquires a vested or protected right in violation of the Constitution," an "unbroken practice" engaged in since 1802 without "the remotest sign of leading to

an established church or religion" was "significant" in showing that the practice was "not a violation of the Religion Clauses." *Id.* at 677-680; *accord Town of Greece*, 572 U.S. at 576 (explaining that history does not excuse a violation but rather shows that a practice is permitted). In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), the Court distinguished *Walz* and struck down a different program in part because it could identify "no historical precedent" for it. *Id.* at 792. In the remaining cases respondents cite, *see* Resp. Br. 69-70, the Court did not find—let alone discount—any post-Founding precedent for the challenged practices.

Respondents also argue that the tradition of erecting memorial crosses is too recent because it does not date to the Founding. *Id.* at 73. In fact, memorial crosses have been erected since prior to the Founding, including one just a few years before the Constitution was ratified. Comm'n Br. 45-46 (describing Acadian Cross constructed in 1785); *see also* West Virginia & 29 Other States Br. 11-15 (describing other memorials from founding era using religious symbolism); U.S. Senators & Representatives Br. 15-17 (same). Furthermore, longevity is probative in large part because it demonstrates that a practice has become "part of our expressive idiom" and can "coexis[t] with *** principles of disestablishment." *Town of Greece*, 572 U.S. at 578, 587 (citation omitted). Thus, several practices paradigmatically "part of our heritage and tradition," *id.* at 587, postdate the Founding: The practice of opening court sessions with the phrase "God save the United States and this honorable Court" dates to approximately 1827; the phrase "In God We Trust" first appeared on the

Nation's currency during the Civil War and became the national motto in 1956; and the words "under God" were added to the Pledge of Allegiance in 1954. *Newdow*, 542 U.S. at 25, 29 (Rehnquist, J., concurring in judgment). The tradition of the commemorative use of the cross has been "part of the fabric of our society" for at least as long. *Town of Greece*, 572 U.S. at 576 (citation omitted).

Trying the opposite tack, respondents argue that the practice of displaying crosses is *too old* because "the values [of] our nation ha[ve] developed" since the time when crosses were prevalent. Resp. Br. 80. On the contrary, Congress—a body "in which our country's religious diversity is well represented"—has repeatedly voted by "overwhelming majorities" in recent years to preserve longstanding cross memorials. *Buono*, 559 U.S. at 727 (Alito, J., concurring in part and concurring in judgment); *see* Comm'n Br. 48–49. An outpouring of amici, including religious minority groups, members of Congress, and more than two dozen diverse States, have filed in support of retaining the Peace Cross and other similar memorials. And individuals "of diverse cultural backgrounds and religious traditions" still gather at the Peace Cross every year "to commemorate American servicemembers." Maryland Elected Officials & Prince George's County Br. 9. The mere fact that several court cases—the earliest dating to the late 1970's—have been filed against cross monuments, *see* Resp. Br. 78, does not suggest that history has abandoned this practice. *Cf. Marsh* v. *Chambers*,

463 U.S. 783, 788 n.10 (1983) (describing prominent objections to legislative prayer dating to the 1850's).[7]

3. Invalidating the Peace Cross would sow division and threaten hundreds of other monuments.

The purposes of the Establishment Clause confirm that the Peace Cross should be permitted to stand. Invalidating this 93-year-old war memorial would tear out a local source of civic unity, Maryland Elected Officials & Prince George's County Br. 8-15, send a message of profound disrespect and betrayal to the descendants of the fallen, Family Members Br. 1-6, 20-21, and convey to veterans and servicemembers that their sacrifices too may one day be forgotten, Military Order of Purple Heart Br. 17-18. It would imperil hundreds of other monuments throughout the country—including two comparable memorials at Arlington National Cemetery—solely because they use a cross. *See* U.S. Senators & Representatives Br. 3-21. The Establishment Clause seeks to prevent religious division; tearing down or dismembering the Peace Cross would sow it. *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).

Respondents' proposed "solution[s]" would merely exacerbate these harms. Resp. Br. 99-100. Their principal suggestion is that the cross be "modified"

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[7] Respondents' claim (at 75) that Jewish groups have opposed cross monuments since the 1920's is not accurate. The Jewish Welfare Board opposed *requiring* the erection of crosses over the graves of individual Jewish servicemembers. JA 1202-03. There is no record that the Jewish Welfare Board or any other group opposed the erection of memorial crosses at Bladensburg, Arlington, or elsewhere.

into a "slab or obelisk" by chopping off its arms, *id.* at 18—an act of such wanton disrespect that one amicus compares it to Swift's "Modest Proposal." Military Order of Purple Heart Br. 2. Alternatively, respondents suggest that the Peace Cross be physically "removed to private property." Resp. Br. 17-18. But as the Commission has explained, the "only way" this aging monument could be moved would be to "dismantle or destroy" it and then attempt to "reconstruct it" at a different location. JA 1073-74. That would not only damage the monument irreparably, but also decouple it from its historically significant location and impair the Commission's ability to ensure its preservation in the future. C.A. JA 621-623.[8]

Furthermore, respondents offer no plausible way to prevent similar acts of destruction from occurring across the country if the Peace Cross is invalidated. Respondents assert that there are virtually no other monuments in the shape of freestanding crosses. Resp. Br. 93-95. That is plainly not correct. *See supra* pp. 16-17. Respondents' estimate of "three" World War I cross memorials is telling: That count omits the Argonne Cross, the Canadian Cross of Sacrifice, the memorial cross at St. Mihiel American Cemetery, the Wayside Cross, the Rustic Cross, the Chestnut Hill and Mt. Airy Memorial, and many

[8] Respondents' suggestion that the Commission is indifferent to whether the monument falls, *see* Resp. Br. 14-15, is absurd. The documents respondents cite were part of a determined effort to *ensure the monument's preservation*, and respondents elsewhere fault the Commission for spending too much money to preserve the monument. *Id.* at 56.

others. *See, e.g.*, Comm'n Br. 7-8 & n.7; West Virginia & 29 Other States Br. 20-23.

Respondents suggest that other cross memorials could potentially be distinguished from the Peace Cross on the ground that they serve as "ethnic marker[s]" or are "integrated component[s] of a larger display." Resp. Br. 93-96 (internal quotation marks omitted). These proposed distinctions are, of course, utterly incompatible with respondents' theory that the Latin cross necessarily conveys a religious message. *See id.* at 30-47. They also make little sense. There is no reason why a cross's "ethnic" associations would render it secular if the established meaning of the cross as a World War I symbol cannot. And the Peace Cross is itself integrated into a larger display. *See supra* p. 14.

Respondents' attempts to distinguish the Argonne Cross and the Canadian Cross of Sacrifice are especially unconvincing. *Id.* at 96-98. Those memorials bear every characteristic respondents claim is fatal to the Peace Cross: They use the Latin cross as a universal symbol of sacrifice, they are substantially larger than the surrounding displays, and they are permanent, government-owned, and longstanding. Comm'n Br. 7; *cf.* Resp. Br. 30-66. Respondents claim these memorials could be distinguished because they are surrounded by individual grave markers bearing religious symbols, and because the area in which they stand is "as sacred as a temple or a church." Resp. Br. 96-97 (citation omitted). But the proximity of sectarian symbols and the "sacred[ness]" of the space would if anything *detract* from the secular nature of these large crosses. *See Van Orden*, 545 U.S. at 702 (finding monument

secular in part because "[t]he physical setting * * * suggests little or nothing of the sacred"). If the Peace Cross falls, then monuments in Arlington and in city squares across the country will not be far behind.

C. The Court Should Not Revisit Its Longstanding Precedents Or Apply *Lemon* Here.

Because the undisputed principles of the Court's Establishment Clause precedents resolve this case, the Court should not revisit those precedents here. *See Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Uprooting the Court's long-settled understanding of the Establishment Clause would inevitably generate deep religious divisions. And it would risk transforming the Peace Cross—long a source of civic unity—into a controversial and divisive symbol. Reversing the decision below under existing law would suffice to resolve this litigation, and would provide substantial clarity for lower courts and local governments on a range of recurring issues. *See* Comm'n Pet. 21-32; Br. of Nat'l Ass'n of Counties *et al.* 25-27.

Nor should the Court decide this case under *Lemon*. The controlling opinions in *Van Orden* and *Buono* did not apply the *Lemon* test, and respondents make essentially no independent argument that *Lemon* supports the judgment below. *See* Resp. Br. 91 n.17, 92-93. Respondents briefly suggest that the Commission's expenditure of $117,000 over the course of 50 years itself amounts to unconstitutional entanglement. *Id.* at 56, 92-93. But these funds paid for groundskeeping and maintenance, and entailed no involvement in or surveillance of religion.

See Comm'n Br. 58. The Establishment Clause plainly does not prevent governments from taking steps to preserve a commemorative monument, and to avoid the disturbing message that would be sent by its removal. *See Buono*, 559 U.S. at 715-717 (plurality opinion); Maryland Br. 2-4.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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FEBRUARY 2019